APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed November 22, 2004]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 123237
COA: 213386
Oakland CC: 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, the motion for reconsideration of this Court's order of June 17, 2004 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

KELLY, J., would grant reconsideration.

[Logo]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 22, 2004

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX B

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed June 17, 2004]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
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SC: 123237
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C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we VACATE the January 17, 2003 judgment of the Court of Appeals and REMAND this case to the Oakland Circuit Court for further development of the factual record through discovery or, if appropriate, for

amendment of the pleadings. In considering a motion challenging jurisdiction under MCR 2.116(C)(4), a court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject matter jurisdiction. MCR 2.116(G)(5). While defendants' statements about self-contribution may, in the abstract, be related to their pension fund duties, further factual development may show that they were not. While we are not by this order endorsing a particular definition of "relate[s] to" for the purpose of preemption under the Employee Retirement Income Security Act (ERISA), 29 USC § 1001 *et seq*, we believe further factual development will assist the circuit court in this matter. We therefore remand for further factual development. For instance, it is not apparent from the pleadings, depositions, admissions and documentary evidence whether the plan administrators had any duty to communicate information to the former employees because it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries activities were protected under ERISA's preemption provisions. *See, e.g., Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825 (1988).

We do not retain jurisdiction.

[Logo]

I. CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 17, 2004

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

[Filed January 17, 2003]

No. 213386
Oakland Circuit Court
LC No. 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

ON REMAND

Before: Bandstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

The instant matter is before this Court on remand from the Michigan Supreme Court on rehearing granted in lieu of granting leave to appeal. The Supreme Court vacated the prior decision of this Court which affirmed the trial court's grant of summary disposition. finding that on the facts of this case we erred in finding summary disposition was granted pursuant to MCR 2.116 (C)(8). The Supreme Court further directed this Court to decide whether the claims raised in plaintiff's complaint are preempted by the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1144(a). 466 Mich 894. We hold that plaintiff's claims are preempted and, therefore, affirm.

I. Facts and Proceedings

Plaintiff C.C. Midwest, Inc., a trucking company, is a wholly owned subsidiary of CenTra, Inc. (CenTra). Until 1996, CenTra also owned Central Transport, Inc. (Transport), another trucking company. At the time of the sale, Transport employed approximately 235 truck drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters), as independent contractors. As members of the Teamsters, the truck drivers were entitled to take part in the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund), a multi-employer pension trust that provides pension benefits to Teamster members.[1] As part of a collective bargaining agreement between Transport and the Teamsters, Transport made financial contributions to the Pension Fund on behalf of the truck drivers it employed. Following the 1996 sale, Transport negotiated with the Teamsters the closing of its business. As part of the closure, Transport agreed to pay a severance package totaling $4.6 million and, according to plaintiff, defendants agreed to permit the former independent contractors to make self-contributions into, the Pension Fund for up to five years.

After Transport closed plaintiff contacted truck drivers previously employed by Transport in order to negotiate possible independent contractual agreements, eventually entering into contracts with fifty-nine owner-operators who were former Transport drivers. Plaintiff alleges that thereafter, defendants advised these and other owner-operators by letter and a meeting in Fort Wayne, Indiana that the drivers would not be able to continue to make self contributions to the Pension Fund if they performed work for plaintiff or any other company affiliated with CenTra. Plaintiff characterizes

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[1] Defendant Kubalanza is the Executive Director of the Pension Fund and the remaining defendants are the trustees of the Pension Fund.

these communications by defendants as threats that resulted in twelve of fifty-nine former Transport drivers subsequently terminating their contracts with plaintiff. In addition, plaintiff asserts that it had a reasonable expectation of negotiating contracts with an additional 153 truck drivers not formerly affiliated with Transport, but that notice of defendants alleged "threats" was communicated throughout the trucking industry resulting in plaintiff only being able to contract with twenty-eight of the 153 potential truck drivers not previously associated with Transport.

Defendants dispute plaintiff's characterization of the meeting and the letter contending that their sole purpose was to inform former Transport workers of the options they had available as a result of Transport's closing, and to also inform them of the consequences employment with plaintiff, or other trucking companies, would have on their rights under the severance agreement negotiated between Transport and the Teamsters as it applied to the Pension Fund.

After plaintiff filed the case in Oakland Circuit Court, defendants removed the case to the federal district court, where they argued that the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC IOO1 *et seq.*, preempted plaintiff's state law tort claims. The federal court found that because plaintiff's complaint asserted solely state clams and since ERISA did not provide plaintiff an opportunity to bring a civil enforcement action under § 1132(a), the case was not removable wader ERISA. *CC Mid West v McDougall*, 990 F Supp 914, 924 (1998).

Thereafter, on remand to state court, defendants moved-for summary disposition pursuant to MICR 2.116(C)(4) and 2.116(C)(8). Defendants argued that the trial court did not have jurisdiction to hear the case because ERISA preempted plaintiff's state claims and, alternatively, that plaintiff failed to state a claim on which relief could be granted. The trial court granted defendants' motion stating on the record that

the existence and administration of the Pension Fund is a critical element of plaintiff's claims, and therefore, plaintiff's claims were preempted by ERLSA. The order entered by the trial court stated that defendant's motion was granted under both MICR 2.11 6(C)(4) and (C)(8).

We now consider the preemption issue as directed by the Supreme Court on remand.

II. Standard of Review

This Court reviews de novo the grant or denial of a motion for summary disposition. *de Sanchez v Dept of Mental Health*, 467 Mich 231, 235; 651 NW2d 59 (2002). We also review de novo the legal question whether a court has subject matter jurisdiction. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). "When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

III. Analysis

The preemption provision of ERISA. 29 USC 1144(a). states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate* to any employee benefit plan" subject to ERISA (emphasis added).[2] The inquiry whether ERISA preempts plaintiff's common law claims begins with the "presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plant v Travelers Inns Co*, 514 US 645, 654; 115 S Ct 1671; 131 L Ed 2d 695 (1995). Indeed, the

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[2] ERLSA does not preempt "any law of any state which regulates insurance." 29 USC 1144(b)(2)(A). This exception is not applicable to this case.

party urging a finding of preemption bears the "considerable burden" of overcoming this presumption, particularly where the subject law is in an area traditionally regulated by the states. *DeBuono v NYSA-ILA Medical and Clinical Services Fund*, 520 US 806, 813-814; 117 S Ct 1747; 138 L Ed 2d 21 (1997).

In a number of its opinions addressing this issue, the United States Supreme Court has recognized that the term "relate to" "cannot be taken 'to extend to the furthest stretch of its indeterminacy.' because under such construction 'for all practical purposes preemption would never run its course.'" *Egelhoff v Egelhoff*, 532 US 141, 146; 121 S Ct 1322; 149 L Ed 2d 264 (2001), quoting *Travelers, supra* at 655; *DeBuono, supra* at 813-814. As such, "a state law relates to an ERISA plan only 'if it has a connection with or reference to such a plan.'" *Egelhoff, supra* at 147; quoting *Shaw v Delta Air Lines, Inc*, 643 US 85, 97; 103 S Ct 2890; 77 L Ed 490 (1983). Despite the Supreme Court's further clarification of the term "relate to," we heartily agree with the sentiment expressed by other courts that "the Supreme Court '[has] been at least mildly schizophrenic in mapping [the] contours [of ERISA preemption].'" *Trustees of the AFTRA Health Fund v Biondi*, 303 F 3d 765, 773 (CA 7, 2002), quoting *Carpenters Local Union No. 26 v US Fid & Guar Co*, 215 Fad 136, 139 (CA 1, 2000).

Because defendants do not argue that the Michigan common law actions reference an ERISA plan, the question before us is whether plaintiff s cause of action relies upon state law which has an impermissible connection with an ERISA plan. "[T]o determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *California Div Of Labor Standards Enforcement v Dillingham Constr, NA,*

Inc, 519 US 316, 325; 117 S Ct 832; 136 L Ed 2d 791 (1997), quoting *Travelers, supra* at 656.[3] Some causes of action, however, are simply "too tenuous, remote, or peripheral" to relate to an ERISA plan. *Shaw, supra* at 100 n 21. In deciding which actions are connected to an ERISA plan by too few threads, we consider factors such as "whether the state law represents a traditional exercise of state authority"; whether the state law "affects relations among the principal ERISA entities rather than relations between one of the principal entities and an outside party, or between two outside parties"; and "whether the state law's effect on the ERISA plans is incidental, thereby having too tenuous a relation to an ERISA plan to `relate to' the plan." *Redall Industries, Inc v Wiegand*, 876 F Supp 147, 150-151 (1995), citing *Firestone Tire & Rubber Co v Neusser*, 810 F 2d 550, 555-556 (CA 6, 1987).

The parties have each cited numerous cases in support of their respective views as to whether ERISA preempts claims for tortious interference with a contract or business expectancy. The common theme emerging from these cases, is that the' determination is made on a case-by-case basis. "'[I]t is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit.'" *MacKay v Grumman Allied Industries, Inc*, 993 F Supp 1068, 1070 (WD Mich 1997), quoting *Cromwell v Equicor-Equitable HCA*

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[3] When Congress passed the preemption provision, it intended

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directive among the States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." [*Travelers, supra* at 656-657, quoting *Ingersoll-Rand Co v McClendon*, 498 US 133,142;112 S Ct 478,112 L Ed 2d 474 (1990).]

Corp, 944 F 2d 1272, 1276 (CA 6, 1991). Therefore, the context of the claim, rather than just its title, is crucial to determining whether the claim is preempted by ERISA.

Within this framework, we turn to an analysis of plaintiff's claims. Defendants characterize plaintiff's claims as allegations that defendants violated their fiduciary duties owed pursuant to ERISA, and assert that ERISA provides the exclusive remedy for breach of their fiduciary duties. Defendants also claim that plaintiff merely disputes a benefits determination that defendants made that allegedly caused harm to the plan participants and that plaintiff is actually making a claim for benefits on behalf of the drivers. We are compelled to disagree with defendants' characterizations of plaintiff's claims. Initially, we note that by vacating our opinion, which found that summary disposition had been granted by the trial court under an MCR 2.116 (C)(8) analysis because plaintiff did not state a viable tortious interference claim, the Supreme Court has implicitly held that plaintiff did state a viable claim. Secondly, because defendants do not stand in a fiduciary relationship with plaintiff, plaintiff's claims do not arise out of an alleged breach of a fiduciary duty. Additionally, plaintiff's claims are for harm suffered in its own right, not for any harm suffered by the drivers, as is the nature of claims for tortious interference. Nevertheless, we conclude that plaintiff's claims are preempted by ERISA.

As we stated in our prior opinion, defendants, as fiduciaries of the Pension Fund, had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. See *Varity Corp v Howe*, 516 US 489, 502; 116 S Ct 1065, 1073; 134 L Ed 2d 130 (1996); See also 29 USC 1104(a). In addition, plan participants are always entitled to information necessary to enable the participant to enforce his rights under a plan or to redress a breach of trust. See, e.g., *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992), citing I Restatement Trusts,

2d, § 173, comment c, p 378. The United States Supreme Court further stated in *Varity, supra*, that:

> Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. . . . To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity. (*Id.* at 502-503; 116 S.Ct. at 1073, citing ERISA §§ 102, 104(b)(1), 105(a).]

As we did in our first opinion, we again conclude that defendants' actions were undertaken as fiduciaries of the Pension Fund. By law, defendants had a duty to inform the plan participants of their rights under the plan and how those rights may be affected by certain employment contracts. *Varity, supra; In re Childress Trust, supra.* The meeting held with and the letter sent to the plan participants by defendants informed the participants that their opportunity to make self-contributions to the plan for a period of up to five years could be jeopardized by employment with certain companies, including plaintiff, and informed the plan participants to contact the Pension Fund's toll free number in order to find out how their decisions may impact their benefits. The trial court did not err by concluding that even if the administration of the fund was malicious an alleged by plaintiff, the manner in which the Pension Fund was administered is a critical factor in plaintiff's claims and thus plaintiffs claims arc subject to preemption. See *Ingersoll-Rand Co v McLendon*, 498 US 133, 139-140; 111 S Ct 478; 112 L Ed 2d 474 (1990).

Although preemption of a state law claim does not exist when only a "cursory. examination" of an ERISA plan's

provisions is required, *Biondi, supra* at 780, ERISA does 'preempt] a state Jaw claim if the claim requires the court to interpret or apply the terms of an employee benefit plan.'" *Id*, quoting *Collins v Ralston Purina Co*, 147 F 3d 592, 595 (CA 7, 1998). Here, because resolution of plaintiff's claims requires the court to determine whether defendant's communications were appropriate under the terms of the fund, the court must go beyond a "cursory examination" of the plan's provisions and interpret its terms. Unlike the plaintiff in *Darcangelo v Verizon Communications, Inc*, 292 Fad 181, 193 (CA 4, 2002), here the plaintiff does not assert "improper conduct so unrelated to the plan that it cannot be termed 'plan .administration' of any sort," but claims that defendants committed torts in tandem with performance of their fiduciary duties. *Id.* Although plaintiff's claims are not intimately tied to "core concerns of the ERISA legislation[,] . . . the plan and the communications giving rise to the [tortious interference claim] appear inseparable." *Fairnerry v Savogran Co*, 422 Mass 469.476; 644 NE2d 5 (1996).

While we recognize that plaintiff also alleges injuries concerning its dealings with owner-operators throughout the trucking industry that had no prior association with Transport, we are not persuaded that these allegations are sufficient to avoid preemption. Plaintiff does not allege in the Complaint that defendants communicated with non-participant owner-operators in any respect. Thus, even if.defendants knew or reasonably should have known that owner-operators throughout the industry might become aware of these communications, the character of these communications as between defendants as fiduciaries and former Transport owner-operators as plan participants does not render the doctrine of preemption inapplicable here. In similar vein, the fact that plaintiff may be left without. a meaningful remedy does not alter the fact of preemption. *Muse v International Business Machines Corp*, I03 Fad 490, 495 (CA 6, 1995); *Massa-*

chusetts Cas Ins Co v Reynolds, 113 Fad 1450, 1454 n 2 (CA 6, 1997).

In summary, we find that plaintiff's claims are preempted by ERTSA and that summary disposition was properly granted.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed July 22, 2002]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 120336
COA: 213386
Oakland CC: 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, the application for leave to appeal from the June 22, 2001, decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals as on rehearing granted to decide the preemption issue. On the facts of this case, it is error to say that the trial

court's decision was granted pursuant to MCR 2.116(C)(8). Accordingly, we VACATE the judgment of the Court of Appeals.

We do not retain jurisdiction.

[Logo]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 22, 2002

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

[Filed June 22, 2001]

No. 213386
Oakland Circuit Court
LC No. 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

In this tortious interference of contract and business expectancy case, plaintiff appeals as of right from the trial court's order granting defendants' summary disposition pursuant to MCR 2.116(C)(4) and (C)(8).[1] We affirm.

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[1] Plaintiff contends that the trial court granted summary disposition pursuant to MCR 2.116(C)(4). At the May 6, 1998 summary disposition motion hearing, the trial court stated that it was granting defendant's motion pursuant to MCR 2.116(C)(4). However, the written order dated and filed, May 8, 1998 states that summary disposition was granted pursuant to MCR 2.116 (C)(4) and (C)(8). Because a trial court speaks through its written orders, the record reveals that defendants' motion was granted pursuant to both MCR 2.116 (C)(4) and (C)(8). See *People v Davie*, 225 Mich App 592, 600; 571 NW2d 229 (1997); See also *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

I. Facts and Proceedings

Plaintiff C.C. Midwest, Inc., a trucking company, is a wholly owned subsidiary of CenTra, Inc. (CenTra). Until 1996, CenTra also owned Central Transport, Inc. (Transport), another trucking company. At the time of the sale, Transport employed approximately 235 truck drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters), as independent contractors. As members of the Teamsters, the truck drivers were entitled to take part in the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund), a multi-employer pension trust that provides pension benefits to Teamster members.[2] As part of a collective bargaining agreement between Transport and the Teamsters, Transport made financial contributions to the Pension Fund on behalf of the truck drivers it employed. Following the 1996 sale, Transport negotiated with the Teamsters the closing of its business. As part of the closure, Transport agreed to pay a severance package totaling $4.6 million and, according to plaintiff, defendants agreed to permit the former independent contractors to make self-contributions into the Pension Fund for up to five years.

After Transport closed, plaintiff contacted truck drivers previously employed by Transport in order to negotiate possible service contracts, eventually entering into contracts with fifty-nine former Transport drivers. However, after being informed by defendants that they would not be able to continue to make self-contributions to the Pension Fund if they performed work for plaintiff or any other company affiliated with CenTra, twelve of these fifty-nine drivers terminated their contracts with plaintiff. In addition, plaintiff believed that it had a reasonable expectation of entering into

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[2] Defendant Kubalanza is the Executive Director of the Pension Fund and the remaining defendants are the trustees of the Pension Fund.

contracts with an additional 153 truck drivers not formerly affiliated with Transport, but as a result of defendants "threats", plaintiff was only able to hire twenty-eight of the 153 potential non-Transport truck drivers.

In its complaint, plaintiff alleged that defendants actions of informing the former Transport workers that they would not be able to participate in the Pension Fund if they worked for plaintiff, amounted to threats, and that these "threats" were a deliberate attempt to deny plaintiff the services of the truck drivers. According to plaintiff, these "threats" occurred at a meeting held in Fort Wayne, Indiana in April of 1997 and in a follow-up letter dated May, 7, 1997. According to defendants, the purpose of both the meeting and the letter was to inform former Transport workers as to what options they had available to them as a result of Transport's closing and to also inform as to what consequences employment with plaintiff or other trucking companies, would have on their rights under the severance agreement negotiated between Transport and the Teamsters as it applied to the Pension Fund. Specifically, plaintiff complained that defendants knew or had reason to know that it had entered into contractual relationships with timer Transport drivers, and that defendants intentionally interfered with these contracts when they authorized or conveyed to former Transport drivers "threats" regarding nonacceptance of self-payments to the Pension Fund for periods in which they enter into independent contractor agreements with plaintiff It was further alleged that defendants made these "threats" to the drivers in an effort to inflict injury upon plaintiff.

After plaintiffs filed the case in Oakland Circuit Court, defendants removed the case to the federal district court, where they argued that the Employment Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.*, preempted plaintiff's state law tort claims. The federal court found that because plaintiffs complaint asserted solely state

claims and since ERISA did not provide plaintiff an opportunity to bring a civil enforcement action under § 1132(a), the case was not removable under ERISA. *CC Mid West v McDougall*, 990 F Supp 914, 924 (1998).

Thereafter, on remand to state court, defendants moved for summary disposition pursuant to MCR 2.116(C)(4) and 2.116(C)(8). Defendants argued that the trial court did not have jurisdiction to hear the case because ERISA preempted plaintiff's state claims and, alternatively, that plaintiff failed to state a claim on which relief could be granted. The trial court granted defendants' motion stating on the record that the existence and administration of the Pension Fund is a critical element of plaintiff's claims, and therefore, plaintiff's claims were preempted by ERISA. Nonetheless, the trial court granted defendant's motion under both MCR 2.116(C)(4) and (CX8).

II. Standard of Review

This Court's review of a motion for summary disposition is reviewed de novo in order to determine whether the moving party was entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With regard to a motion pursuant to MCR 2I 16(C)(4), we are to consider all pleadings, affidavits, and other documentary evidence submitted by the parties and construe them in favor of the nonmoving party. *Beulah Hoagland Appelton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). For a motion to be granted under MCR 2.116(CX8), the pleadings must make it clear that the plaintiff has failed to state a claim on which relief can be granted and that no amount of factual development would justify the plaintiff's claim for relief. *Spiek, supra*. Further, the pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an

answer. *Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000), citing MCR 2.110(A); See also *Ferrell v Vic Tanny*, 137 Mich App 238, 243; 357 NW2d 669 (1984) and MCR 2.113(F)(1 Kb) and (F)(2).

III. Analysis

On appeal, plaintiff argues that the trial court erred in determining that the general preemption provision of ERISA, § 1144(a), applied in this case and that its tortious interference claims were claims on which relief could be granted. In contrast, while defendants maintain that ERISA preempts plaintiffs tortious interference claims, they alternatively argue that the trial court correctly granted summary disposition to them pursuant to MCR 2.116(CX8). Because we agree that plaintiff failed to state a claim on which relief could be granted, we affirm. Since we find that plaintiff failed to state a valid tortious interference claim under either of its two counts, we find it unnecessary to decide the question of whether plaintiff's claims are preempted by ERISA.

As a preliminary matter, we note that plaintiff failed to include the issue of whether the trial court correctly ruled on defendant's (C)(8) motion as a question presented before this Court. Thus, the issue has not been properly presented for appellate review and ordinarily we would not consider it. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); See also MCR 7.215(C)(5). Nonetheless, because the issue is a question of law and the facts necessary for its resolution have been presented, *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *McKelvie v Auto Club Ins Assn*, 203 Mich App 331, 337; 512 NW2d 74 (1994) and since defendant properly raised the issue as an alternative ground for affirming the trial

court's decision and we find it to be dispositive,[3] we will address it. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *In re Herbach Estate*, 230 Mich App 276, 284; 583 MW2d 541 (1998).

The elements of tortious interference with a business expectancy or relationship are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996), citing *Lakeshore Community Hasp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Similarly, the elements of tortious interference with contractual relations are that (1) a contract existed, (2) it was breathed, and (3) defendant instigated the breach without justification. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992), citing *Jim-Bob, Inc v Melding*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); See also *Derosia v Austin*, 115 Mich App 647, 653; 321 NW2d 750 (1982). In order for a plaintiff to recover under either theory of tortious interference, the plaintiff must allege that the defendant's international interference was a "'per se wrongful act or the doing of a lawful act with malice'" and without justification in law. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). See also *BPS, supra*. For an act to be "wrongful per se", it must be an act "that is inherently wrongful or an act that can never be justified under any circumstances." *Patillo v Equitable Life Assurance Society of*

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[3] We note that even if we were to agree with plaintiff that it's claims were not preempted, we would then have to address the issue of whether plaintiff's complaint alleged a valid claim on which relief can be granted.

the United States, 199 Mich App 450, 457; 502 NW2d 696 (1992), citing *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). To show that a lawful act was committed with malice and without justification in law, "the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive or interference." *BPS, supra*, citing *Feldman, supra* at 369-370; See also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994); *Dolenga v Aetna Casualty & Surety Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990). Further, if a defendant's actions were motivated by legitimate business reasons, then those actions would not constitute improper motive or interference. *BPS, supra*, citing *Michigan Podiatric Medical Assn v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989)

Defendants, as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. See *Varity Corp v Howe*, 516 US 489, 502; 116 S Ct 1065, 1073; 134 L Ed 2d 130 (1996); See also 29 USC 1104(a) and MCL 700.814(1); MSA 273814(1). In addition, plan participants are always entitled to information necessary to enable the participant to enforce his rights under a plan or to redress a breach of trust. *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992), citing 1 Restatement Trusts, 2d, § 173, comment c, p 378. The United States Supreme Court further stated in *Varity, supra*, that:

> Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan.. . . To offer beneficiaries detailed plan information in order to

> help them decide whether to remain with the plan is essentially the same kind of plan-related activity. [*Id.* at 502-503; 116 S Ct at 1073, citing ERISA §§ 102, 104(b)(1), 105(a).]

Here, it is apparent that defendants actions were undertaken as fiduciaries of the Pension Fund. By law, they had a duty to inform their participants of their rights under the plan and how those rights may be effected by certain employment contracts. *Varity, supra; In re Childress Trust, supra.* The letter defendants salt to the plan participants clearly informed the participants that they had the opportunity to make self-contributions for a period of up to five years and also informed them that they could not make contributions during any period of time in which they were employed by certain companies, including plaintiff. The letter also communicated to the participants of the plan that they should contact the Pension Fund's toll free number in order to find out how, their decisions may impact their benefits. As such, it is apparent that defendants were acting under legally mandated obligations to inform its participants of its rights under their plan.[4] Hence, defendants were motivated, at least in part,

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[4] In fact, after reviewing the record, this Court has been unable to find any evidence or assertion by plaintiff attacking the veracity of defendant's letter concerning the participants' employment with plaintiff. Instead, plaintiff maintains that the participants were not entitled to make benefits regardless of their employment status. Assuming this to be true, then plaintiff's claim is without merit. The former Transport drivers would have become aware of this fact when their self-contributions were denied, therefore, indicating to the former Transport drivers that working for plaintiff would have no impact on their ability to make (or not make) self contributions to the Fund. Accordingly, giving plaintiff the benefit of the doubt on this question, we are persuaded that defendant's actions caused no damage to plaintiff See *BPS, supra* at 687. Further, plaintiff's complaint does not indicate how defendant's "threats" to the former Transport workers would have any affect on the non-Transport drivers decisions to work for plaintiff.

by legitimate business reasons and therefore could not have tortiously interfered with plaintiff's contracts or business expectations. *BPS, supra; Coleman-Nichols, supra*; See also *Patine, supra.* Accordingly, defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8).[5]

Because we find that summary disposition was 4pp,opriate under (C)(8), we need not determine plaintiff's claim was also properly dismissed under (C)(4) based ERISA preemption. See *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; NW2d (2000), citing *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997); *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147, 150; __NW2d.__ (2000). See also *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 516; 601 NW2d 130 (1999); *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda It. Gage
/s/ Kurtis T. Wilder

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[5] Even though this decision is reached by reviewing the contents of defendant's letter to the Pension Fund participants, because the letter was a written document, attached to plaintiff's complaint, and plaintiffs complaint relied on the letter, this Court should review the letter when assessing whether plaintiff stated a claim on which relief could be granted. See *Ferrell, supra* at 243. Sec also MCR 2.113(F)(1)(B) and (F)(2); 4 Dean & Loaghofer, Michigan Court Rules Practice, pp 316-317 (1998).

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

[Filed May 15, 1998]

Case No. 97-550272-NZ

C.C. MID WEST, INC.,

Plaintiff,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,

Defendants.

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ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS AND DISMISSING CASE

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan on May 8, 1998.

PRESENT: DENISE LANGFORD-MORRIS
Hon. Denise Langford-Morris

Upon reading Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim and Brief in Support and exhibits attached thereto; having read Plaintiff's Response to Defendants' Motion for Summary Disposition Pursuant to MCR 2.1I6(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim; having read Defendants' Reply Brief in Further Support of Their Motion for Summary Disposition; oral argument having been heard on Wednesday afternoon, May 6, 1998; it appearing that Defendants are entitled to the relief requested; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim shall be and is hereby granted, and the case is dismissed, for all of the reasons set forth on the record in open court.

DENISE LANGFORD-MORRIS
Hon. Denise Langford-Morris

APPROVED AS TO FORM:
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STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 97-550272-NZ

C.C. MID WEST, INC.,

Plaintiff,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,

Defendants.

SUMMARY DISPOSITION MOTION

PROCEEDINGS had in the above-entitled matter be fore the HONORABLE DENISE LANGFORD MORRIS (P34884). Circuit Judge, on WEDNESDAY, MAY 6, 1999.

APPEARANCES:

MICHAEL F. SMITH. Esq., (P49472)
appearing on behalf of the Plaintiff.

STEPHEN WASINGER, Esq., (P25963)
PETER A. ALTER, Esq., (P10145)
JAMES D. O'CONNELL,
appearing on behalf of the Defendants.

PAMELA L. VOLL
Official Court Reporter
CSR 0195

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SIXTH JUDICIAL CIRCUIT
WEDNESDAY, MAY 6, 1998

COURT CLERK: Calling the matter of C.C. Mid West versus McDougall, et al. case no. 97-550272-NZ.

THE COURT: Appearances.

MR. WASINGER: Your Honor, for the Defendants, Stephen Wasinger and Peter Alter. Also with us here today is Mr. James O'Connell who is a lawyer with the Defendant Central States Funds.

MR. SMITH: Michael F. Smith, on behalf of the Plaintiff C.C. Mid West.

THE COURT: You may proceed.

MR. WASINGER: Thank you, Your Honor.

I think the parties' briefs cover, Your Honor, the issues, and what I would like to do and what I had hoped to do is not spend a lot of time repeating what is in the briefs, but rather try to focus on what appears to emerge as the central and core issues.

Your Honor will recall that this case involves a claim by C.C. Mid West that the Defendants, who are all fiduciaries of an ERISA pension plan, have tortiously interfered with them when they made certain decisions about benefits under the plan and communicated those plans to the beneficiary.

The case was originally removed to Federal Court, but Judge Rosen decided that under the well pleaded complaint rule, that the removal was inappropriate, and it was remanded back to this Court. I don't think there's any dispute about the fact that Judge Rosen did not decide the underlying question whether the claims were preempted by ERISA, and in fact, as Judge Rosen himself said, he couldn't do that.

What really has emerged, it seems to me. Your Honor, with that background in mind, is that C.C. Mid West, which is a trucking company that wanted to employ and did employ some of the beneficiaries has contended that a decision that the fiduciaries made was malicious and, therefore, it gives rise to a state law claim. What the fiduciaries argue is that in fact the Court cannot even begin to resolve that dispute without looking at the terms of the plan.

And I think perhaps the clearest way of seeing this, Your Honor, is to look at the brief that was filed by C.C. Mid West itself where they contend, among other things, at page 12 of their brief that the fiduciaries used an inappropriate reason under the plan. They suggest, for example, that the decision by the fiduciaries to allow the participants to self-pay was an abuse of the terms of the plan. And this, it seems to me, and to the fiduciaries, gets to the core issue. If the fiduciaries misread the plan, or if the fiduciaries deceived the beneficiaries about the terms of the plan, then those issues are issues which necessarily cause this Court to have to look to the plan and look to the actions of the fiduciaries, and that isn't a matter that is exclusively one of federal concern.

Similarly the C.C. Mid West brief argued that, well, this is a situation where we're not really seeking damages from the plan. What we're trying to do is seek damages from these fiduciaries; but the fiduciaries, Your Honor, under the terms of the complaint, were acting in their capacity as fiduciaries, and therefore the only way that one could determine whether they were liable individually or liable on behalf of the fund is

to look at the terms of the plan and the scope of Federal fiduciary duty law under ERISA to determine whether that was true.

Said another way, and perhaps, more simply, Your Honor, if the fiduciaries had made a different decision about benefits, if the fiduciaries had said that there were benefits here, we wouldn't have a complaint. The complaint is based on the fact that the fiduciaries decided that there weren't benefits available to people who went to work for C.C. Mid West because of their understanding of the plan and various other issues that arise out of the construction of the plan.

Similarly, if the fiduciaries had not communicated with the beneficiaries, there would not be a claim here, but they did communicate with the beneficiaries, and as the Supreme Court cases make clear, Your Honor, they were obligated to communicate with the beneficiaries about their benefits.

So, what we have I think here is a very core ERISA, concern; that is to say a determination of benefits, a communication about benefits, and now a claim by a third party that somehow or another it has been harmed by those considerations.

But in order for the Court to give any credence to C.C. Mid West's claims, the Court in essence would subject the fiduciaries to a standard that is different than the standard under ERISA, and in doing so, they would subject the fiduciaries to different standards of different federal and state standards. and that is precisely what ERISA preemption is all about.

The biggest argument that comes from C.C. Mid West's brief is that we really are an outsider and somehow or another because we're an outsider, that should change the Court's analysis. But I think that the Court could consider it in this ways and that's why I said the decision about benefits is the key decision. If one came—if an ERISA fiduciary made a decision in the best interests of the plan. Your Honor, that it

would purchase prescription drugs from Arbor Drug Store because they had the best prices, and therefore it was in the best interests of the beneficiaries, Walgreen Drug Stores would not be allowed to come into court and complain that somehow or another that harmed them because they weren't selected to be a provider to the plan. In that situation, the Court would have to examine the fiduciaries' determinations, and in doing that, the Court would be necessarily involving itself in the administration of the plan.

There has been a suggestion in the brief of C.C. Mid West that the problem with the trustee's claim is that it arises out of old ERISA cases and that there has been some sea change in the court—in the decisions since those earlier decisions were decided. And I think, Your Honor, that simply isn't correct. If one looks at the cases, all of the cases continue to recite the same principles and the same principles whether they're in the newer cases or the older cases, and those principles are basically these: If the claim requires the Court to look to the terms of a plan in order to decide whether somebody's right has been violated or not, then the claim is preempted, whether or not you specifically so state or not. And the primary example of that kind of case was the Ingersoll-Rand case whether they made a determination—where the person brought a wrongful termination claim under state law and argued that because—that he was wrongfully terminated because the employer didn't want to pay pension benefits. The Texas Supreme Court held that that claim wasn't preempted. The United States Supreme Court held that it was because necessarily, the Court, in order to decide whether there was wrongful termination would have to look to the terms of the plan.

Most of the cases that C.C. Mid West has cited are cases that involve a different set of circumstances; they are claims where there is a fiduciary or a plan or whatever that has dealing outside of the benefit context, outside of the commu-

nication with beneficiaries about benefits context. The one case that they think—that they suggest is the closest is the *Strehl* case, Your Honor, and that case really demonstrates the point. What happened there, there was a defamation claim under state law. The argument was that the trustees had defamed a physician. The Court was careful to say that that claim did not involve any examination of the plan itself or any benefit determination under the plan, and the Court made clear that if there had been a benefit determination, or if the Court would have to look to the terms of the plan, then there would be preemption.

I want to also address, Your Honor, the separate and distinct issue, which I think illustrates why this really is a claim that should be preempted or in any event, found to be inappropriate even under state law, because essentially what is happening here is the C.C. Mid West is attempting to chill the behavior of the fiduciaries by having the fiduciaries consider the actions of third—the rights of third parties when they go about making a decision whether there is a benefit or there isn't a benefit. And as I said earlier, there wouldn't be a case here, Your Honor, if the trustees had concluded that these participants were entitled to a continuation of self-payment if they worked for C.C. Mid West; it's only because the benefit determination turned out the other way.

And as we pointed out in our principal brief, and as I don't think C.C. Mid West has ever really quarreled with, it's fundamentally the case that trustees or fiduciaries, whether its under Michigan law or whether it's under ERISA, are not entitled to consider the interests of third parties, be they C.C. Mid West or anyone else, in making a decision whether benefits are appropriate. And if they do, the remedy is a remedy under the fiduciary duty law, not under some other law.

And what would happen in this case, Your Honor, if the kind of claim that C.C. Mid West is asserting were allowed, is that there would be a chilling effect upon the ability of

trustees, be they ERISA trustees or common law trustees, to carry out their duties because they'd be subject to second guessing by any person who might be injured by a decision because the trustee chose to do business with A rather than B, or because the trustee chose to give a particular benefit or not give a particular benefit.

And that's why we also suggested, Your Honor, that there is a fundamental public policy issue with this claim. I think that as I said earlier, the briefs have covered this pretty well, but again, in summary, I really think that if you just look at their own brief and see what they complain about, they complain about the fact that we either misread our plan or miscommunicated what the plan was to the beneficiaries, and therefore they necessarily want this Court to read the plan and make decisions about the plan.

Thank you, Your Honor.

THE COURT : Thank you.

Any response?

MR. SMITH: Your Honor, this is not about the decision. It's not about the communication. It's about these individuals acting with the one tool that they had at their disposal, and that's access to these individuals' retirement benefits in an effort to harm C.C. Mid West. That's what this case is all about. It's not about the terms of the plan.

Now, I think we've heard some of this regarding the sweep of ERISA preemption before. The Defendants in Federal Court, when they removed from this Court, tried to sell the Court with that. I think clearly they over-stated the sweep of ERISA preemption, and I think they're doing it again here today.

It's clear that under the recent Supreme Court decisions there is more that goes into the decision than just saving a claim relates to ERISA or a state law relates to ERISA. And I

think given the analysis that we've provided in our brief, it seems clear the C.C. Mid West's claim is not preempted.

I think when you boil down the Defendants' claim, what they're saving is prosecution of this lawsuit would improperly interfere with their duty to make decisions under the plan, and, in effect, it would tie them up with all sorts of state law duties that ERISA doesn't comprehend. Well for ten years it's been the case that ERISA plans and fiduciaries are subject to state laws of general applicability. I think if you look at the Supreme Court's case in *Mackey* that we cited in our brief, that's the case. What the Court says is run of the mill claims for unpaid rent, unpaid creditors, even torts are not subject to preemption.

I think the two cases of *Strehl*, which counsel mentioned, and also *Grand Park Surgical Center*, which we cite, are directly on point. Here you have cases where you have third parties to an ERISA plan. They're not beneficiaries, they're not participants, they're not fiduciaries, asserting claims arising out of actions that fiduciaries have taken. And. clearly, in both those instances, the claim survived a preemption argument. And I submit that this case is more analogous to those two cases than any other that Defendants have cited.

Acceptance of their argument that ERISA provides some sort of bullet-proof vest for any decision they make would insulate these individuals from any liability for anything.

We make the point in our response—and I don't think it was ever responded to—of the trustees making a decision about plan benefits, conditioning it upon participants going out and committing some unlawful act. If you go and break the shop windows of every merchant who belongs to certain ethnic groups, certain racial groups, you can have this benefit. If you apply their standard, they could make that decision and be immune from liability. And I don't think it's too much of a stretch to say that Congress never intended that that happen in an acting ERISA preemption.

This is especially true here where you've got an area of traditional state law regulation, which tortious interference is. This isn't an area such as in so many of the cases the Defendants cite, where you've got a law that affects hospitals or affects insurance plans. There, it directly impacts upon ERISA entities, and that's why in those cases a preemption is held appropriate.

I think the mention is made in Defendants' reply brief that, no, that's not true, we can't discriminate because title 7 is still out there, Federal law is not preempted, title 7 prohibits us from discriminating. And I think that's indicative of their attitude. They've got this attitude that they're not subject to *Elliott-Larsen*; they're not subject to any other state law regarding discrimination. Accepting that argument, they could make a decision as to benefits based on someone's weight: that's not actionable under title 7: it is actionable under *Elliott-Larsen*, and they'd still be immune.

They have a considerable burden to meet, and I don't think that they've met it here.

The purpose of ERISA preemption, after all, is to protect participants and beneficiaries. It's not to provide fiduciaries with some sort of magic shield that protects them from all liability for any tortious action that they take deliberately. And I would cite the Court to the discussion in the case of *Andrews Clark*, which we cite in our response at 4.

With regard to the Defendants' motion that no claim has been stated, I think it's clear that we have stated a claim, given the elements of the claim under Michigan law, and what we've alleged. Clearly, whether that claim can be supported by the facts is not what we're here to decide today, and it's not known today. But I think looking at the complaint on its face, which the Court is obligated to do, it's clear that we have stated a claim. As was pointed out in the cases of *Seven D Enterprises* and in *Stack*, this inference of regularity that

the Defendants are saying attaches to their actions, has been challenged: it's been challenged by the complaint. They obviously disagree. They don't think they did anything improper. The complaint alleges differently and, therefore, it states a claim sufficient to survive the (C)(8) motion.

I'd like to address a couple of the points that defense counsel brought up in his argument. He cites this case of the two drug stores, this hypothetical. And I think the case that we've cited of *Thrift Drug*, coincidentally involves a drug store, but I think it addresses that issue. Here, you've got a state law claim for breach of contract by a pharmacy for a planned administrator's failure to reimburse for prescriptions that were dispensed. You would have to look at the plan to determine if there was a violation there, if there was a duty to reimburse. That claim survived.

We're not trying to chill the Defendants' ability to make decisions anymore than they're already chilled by the numerous state laws of general applicability that apply to them, and I think that's the paint that needs to be made here.

We've pointed out in our brief, they're subject to numerous laws, just like the rest of us. And where they decide to act on a long-standing animus that they have for this company and its corporate parent by using the one weapon at their disposal to try to drive this company out of business and then they want to hide in Chicago behind ERISA preemption, I don't think that ought to be allowed.

Thank you.

THE COURT: Any brief rebuttal?

MR. WASINGER: Yes. Your Honor.

I think that if one listens to Mr. Smith's argument and then looks at the cases that he says, that one will see exactly the difference between our position, which I believe is the correct position, and their position, take for example the issue about

the *Elliott-Larsen*, law. Clearly, the original ERISA preemption case, *Schell versus Delta Airlines*, Your Honor. was a case that held that the New York Human Rights Law was preempted, and the reason—the particular reason there had to do with the fact that in *Shaw*, the New York Human Rights Law prohibited discrimination based upon gender and pregnancy. And the issue was whether or not ERISA would preempt that statute as regards not to discrimination against people who might work for you, but as regards to benefits. And what the United States Supreme Court said in *Shaw* is that as applied to ERISA plan with respect to ERISA concerns about benefits or otherwise, it is in fact preempted. That's what distinguishes it from other laws of general jurisdiction, such as a criminal law. If you had a criminal law that says you may be an ERISA fiduciary. but you're driving to work and you run over somebody, you can't claim that because you're an ERISA fiduciary that you're not subject to the laws that regulate driving or crime or otherwise. And nobody has suggested that these fiduciaries are entitled in some private or other context to engage to racial discrimination or sexual discrimination or anything other than that. However, when they make a benefit determination, then the state law has to be examined in the context—in that context. And the courts have regularly looked at laws that have salutary state purposes and found them to be preempted when they speak to benefits or when they speak to uniform administration of the plan.

The other matter that he talks about, the *Thrift Drug* case, Your Honor, is exactly our case in terms of demonstrating the distinction because, if you read that case, what the issue there was, there was a pharmacy that claimed that it had not been paid for certain monies, and the question was preemption; it was raised at the last minute. And when they looked at the case, the Court specifically said: These people are not claiming that they misadministered the plan or they had inappropriate standards for reimbursement or anything else. Had they

made that kind of determination, then the claim would be preempted because it would involve us as a court in looking at the terms of the plan to see if it was appropriate. So, if, for example, C.C. Mid West delivered goods to the plan and wanted to be paid for its goods, nobody would suggest that a state law saying you can collect your debts isn't preempted; that's the case that they cite for example where somebody loaned—borrowed money from a plan, and the question was whether that was preempted. No, it isn't. That's a state law concern.

The difference in this case, Your Honor, is specifically they are quarreling about a benefit decision. They are quarreling about the fact that the trustee said: You don't have benefits under this plan if certain circumstances occur. And that's exactly why, Your Honor, in this case there's preemption.

And the other thing I think that we need to keep here in mind is that what they essentially suggest is that if the trustees didn't do it maliciously, then you wouldn't have a state law claim. But if they did it maliciously, you would have a state law claim. Your Honor, that creation of that—of allowing that adjective to transform the scope of ERISA preemption would obliterate ERISA preemption because all anyone would ever have to say is the trustees maliciously made a decision about benefits. That was the case. Your Honor, in the cases that we've cited, like *Ingersoll-Rand*, where the whole point was that the argument was that the beneficiaries were arguing that the trustees did something maliciously.

So. I think that there is a sound and valid distinction that is necessary to be enforced in this case. They are complaining about a benefit decision; they're complaining about communications with the participants about the beneficiary decision, and that's why it's preempted. Thank you, Your Honor.

THE COURT: Thank you.

This matter is before the Court on Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(4) and (8). A response has been filed, and the Court has heard oral argument.

Although, I have to indicate, Mr. Alter, I don't think I've seen you this quiet in quite some time.

MR. ALTER: You're right, Your Honor.

MR. WASINGER: I exert a salutary influence on him, Your Honor.

MR. ALTER: We couldn't both argue. We fought it out, and he got to argue.

THE COURT: I see.

The facts are briefly as follows: This is an action for tortious interference with contractual relations and business expectancies brought by C.C. Mid West, a trucking company, against eight trustees and the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund (hereinafter "Fund"). The Fund is a multi-employer pension benefit plan that receives contributions from employers accepted for participation in the Fund and pays pension benefits to retired employees of those employers. CenTra, Inc. owned Central Transport, a trucking company who was a participant in the Fund.

In 1997, Central Transport shut down its operations and laid off 235 truck drivers who had pension contributions made to the Fund on their behalf by Central Transport. After the lay-off, Defendants allegedly told these drivers that they could self-pay into the Fund to protect their full pension benefits.

Plaintiff, a subsidiary of CenTra, Inc., attempted to employ the services of these drivers and entered into independent

contractor agreements with some of the drivers and was actively negotiating with other drivers. Plaintiff allegedly wanted these drivers to continue self-paving into the Fund.

Defendants claimed that the Fund believed such self-pay contributions by employees working for an affiliate of CenTra, Inc. would violate the Fund's plan and rules regarding self-contributions and adverse selection. Defendant Kubalanza wrote to former Central Transport employees advising them that they would not be able to make self-contributions during any period of time they worked for any CenTra. Inc. affiliate.

Plaintiff alleges that these communications constituted threats that were calculated to force the laid-off drivers who had entered into independent contractor agreements with Plaintiff to sever those ties since Plaintiff did not make contributions to the Fund. Plaintiff claims that Defendants knew or reasonably should have known that the threats would have a chilling effect on negotiations between Plaintiff and former Central Transport employees.

Plaintiff filed suit in Oakland County Circuit Court and Defendants removed the case to Federal Court. The Federal Court issued an opinion in *C.C. Mid West versus McDougall.* 1998 WL 24240 (ED Mich 1998), and ruled that Plaintiff's claims were not removable under ERISA, that the complaint asserted solely state law claims and that Plaintiff would be unable to bring civil enforcement actions under Section 1132(a) because Plaintiff was not a party authorized to do so under that section. The Federal Court found that ERISA simply did not regulate the relationship between C.C. Mid West and the Fund, if a relationship existed, and the Court refused to allow Defendants to inject a federal question into Plaintiff's case to transform the action into one arising under Federal law. The Federal Court remanded the case, however it did not decide the issue of whether there was preemption. Defendants filed the instant Motion for Summary Disposition.

The standard of review is as follows:

MCR 2.114(C)(8) provides for summary disposition for failure to state a claim on which relief can be granted. The Court determines whether Plaintiff has alleged a prima facie case based solely on Plaintiff's pleadings. *Garvelink versus Detroit News*, 206 Mich App 604, 607, 1994; MCR 2.116(G)(5). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences which can be drawn from the facts. *ETT Ambulance versus Rockford Ambulance*, 204 Mich App, 393, 395, 1994. Mere statements of conclusions, unsupported by allegations of fact will not suffice to state a cause of action. *Id.* Summary disposition is proper if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* At 396.

MCR 2.116(C)(4) provides for summary disposition if the Court lacks jurisdiction of the subject matter. The affidavits, together with the pleadings, depositions, admissions and documentary evidence must be considered by the Court. MCR 2.116(8)(5).

The analysis is as follows:

Certain causes of action brought under state law can be completely preempted by ERISA, and are thus removable to Federal Court, where they fall within the scope of the civil enforcement provisions of ERISA. *Anderson versus EDS*, 11 F3d 1311 (5th Cir, 1994). However, determining which state law actions are completely preempted and which are not is a difficult task. The Supreme Court has recognized two types of civil suits that can be brought against ERISA plans. The first involves suits brought by ERISA entities under the enforcement actions under Section 502 to secure certain specified relief. Such actions generally completely preempt state law. The second category includes lawsuits against ERISA plans for ordinary state law claims such as torts committed by an

ERISA plan, brought by non-ERISA entities. *Mackey versus Lanier Collection Agency*, 486 US 825, 1988. Such actions generally do not preempt state law. Cases that have found complete preemption by ERISA of state law claims generally involve two themes: 1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and 2) the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries. *Memorial Hospital versus Northbrook Life Insurance*, 904 F2d, 236 (5th Cir. 1990). Several cases have found that the second factor is the more important one, in part because it involves an analysis of ERISA`s Section 514(a), which mandates that ERISA will not preempt a state law unless the state law "relates to" an employee benefit plan. *Barringer versus Parker Brothers*, 877 F Sapp 358, 1995. The Supreme Court has adopted a broad construction of the "relates to" language under ERISA by concluding that a state law "relates to" an employee benefit plan" if it has a connection with or reference to such plan." *Shaw versus Delta Airlines*, 463 US 85, 1983. The Court noted that it would not extend the "relates to" language beyond reasonable bounds. The Court also noted that some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a Finding that the law "relates to" the plan. *Id* at 100, n 21. The Court explained that there is a fundamental distinction between state laws that have a general application and laws that specifically refer to ERISA benefit plans. *Mackey*, 486 US at 825. In making the distinction between state laws which have a "clear connection with or reference to" ERISA plans and state laws which have a remote or tenuous connection with ERISA plans, courts must look to the objectives of the ERISA statue as a guide to the scope of the state law that Congress understood would survive. *DeBuono versus NYSA-ILA*, 117 S.CT 1747, 1997. *DeBuono*, specifically found that ERISA would preempt

claims where "the existence of a pension plan is a critical element of a state law cause of action." *Id* at 1752.

In the instant case, this Court finds that the existence and administration of the Fund is a critical element of Plaintiff's claim. Plaintiff seeks to hold the Defendants liable under state law for their decisions about the self-pay benefits and for their communications with Fund participants. Both of these activities are ERISA concerns because the duties and liabilities of the Fund fiduciaries are defined by ERISA itself.

Plaintiff is suing the Defendants because they made benefit determinations, namely that former Central Transport drivers would not be allowed to continue to self-pay into the Fund if they went to work for an affiliate of CenTra, Inc., and the relief sought by Plaintiff would require the Defendants to either change their benefit determinations or would penalize the Defendants for their failure to change them. Plaintiff's claims are clearly "related to" an ERISA plan. The existence of the Fund is the essential element in Plaintiff's complaint.

Thus, after careful review of the relevant case law, the pleadings and documentary evidence, this Court finds that allowing Plaintiff to assert its state law claims under the circumstances presented by this case would thwart the purpose of Congress in enacting ERISA.

Therefore, Summary Disposition is appropriate pursuant to MCR 2.116(C)(4) because Plaintiff's state law claims are preempted by ERISA and this Court lacks subject matter jurisdiction.

In conclusion, it is hereby ordered that Defendants Howard McDougall, Robert Baker, Arthur Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George Westley, Ray Cash and Ronald Kubalanza's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) is granted.

I'll sign the appropriate order.

* * *

CERTIFICATE OF COURT REPORTER

I, PAMELA L. VOLL, an Official Court Reporter, do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that the same was later reduced to typewritten form by me, and that the foregoing transcript constitutes a true and correct transcription of my stenographic notes so taken.

/s/ PAMELA L. VOLL
Pamela L. Voll
Official Court Reporter
CSR 0195

APPENDIX G

UNITED STATES DISTRICT COURT
E.D. MICHIGAN, SOUTHERN DIVISION

[Jan. 14, 1998]

No. 97-CV-74831-DT

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v.

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

OPINION AND ORDER TO REMAND CASE TO OAKLAND COUNTY CIRCUIT COURT

I. INTRODUCTION

On August 25, 1997, Plaintiff C.C. Mid West, .Inc., filed a Complaint against Defendants in Oakland County Circuit Court alleging claims of tortious interference with contractual relations and tortious interference with business expectancies. Specifically, Plaintiff, a trucking company, is suing nine Defendants for damages allegedly caused by threats Defendants have made relating to a pension fund in order to deter independent contractors from contracting with C.C. Mid West.

On September 22, 1997, Defendants filed a Notice of Removal stating that the Court had original jurisdiction over Plaintiff's claims under the Employee Retirement Income

Security Act ("ERISA"), 29 U.S.C. § 1132(e), because the claims asserted an action against Defendants who are fiduciaries of an employee pension benefit plan subject to that Act. Thus, Defendants claimed the case was removable pursuant to 28 U.S.C. §§ 1441 and 1446.

Plaintiff contested the removal in a Motion to Remand dated October 2, 1997, claiming that its Complaint sought relief wholly on state-law grounds and did not present a federal question. On October 10, 1997, Defendant filed a Response to Plaintiffs Motion to Remand, to which Plaintiff submitted, a Reply Brief on October. 20, 1997.

II. FACTS

Plaintiff C.C. Mid West is a trucking company based in Warren, Michigan. Defendant Howard Kubalanza, is the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund, a multi-employer pension fund ("the Fund"). Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley, and Cash are all Trustees of the Pension Fund. The Pension Fund is a multi-employer pension benefit plan that receives contributions from employers accepted for participation in the Fund and pays pension benefits to retired employees of these employers.

In the 1980's and early 1990's, Central Transport, Inc. was. a trucking company owned by a holding company called CenTra, Inc. Central Transport participated in the Fund pursuant to the terms of a participation agreement, a provision of which prohibited a participating employer from engaging in agreements to divide employees doing the same type of work into two groups, one which participates in the Fund and one which does not.

Defendants claim that in the mid-1990's the Fund became concerned that Central Transport was participating in such an arrangement. Specifically, the Fund was concerned that CenTra had allocated employees and work among its various

subsidiaries so that the employees more likely to qualify for a pension were placed in subsidiaries participating in the Fund, and the employees less likely to qualify for a pension were placed in subsidiaries not participating in the Fund.[1]

At the time of the Fund's investigation, Central Transport was one of a number of trucking company subsidiaries of CenTra. Other such subsidiaries included C.C. Mid West, a non-participating company. The Fund was allegedly concerned that CenTra was moving work and employees from Central Transport to C.C. Mid West and/or other non-participating companies.[2] In early 1997, Central Transport shutdown its operations and laid off 235 truck drivers. As employees of Central Transport, the drivers had pension contributions made to the Fund on their behalf by Central Transport. After the layoff, Defendants allegedly told the laid-off drivers that they could self pay into the fund in order to safeguard their full pension benefits. The Fund's "Self Contribution" program allows employees to make voluntary contributions to the Fund during times in which his employer is not required by the collective bargaining agreement to make contributions on his behalf (e.g., if the employee is laid

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[1] The Fund claims that such behavior places the Fund's actuarial soundness at risk, because the Fund relies upon some participants quailfying for pensions while others do not.

[2] During the investigation; the Fund received a collective bargaining agreement entered into by Central Transport and the unions which covered the 1994-1998 period and which required contributions to the Fund. The agreement provided for Central Transport to pay a higher contribution rate, which would qualify its employees for higher pensions, if the agreement were accepted by the Fund. The Fund postponed its decision until the investigation was complete. Central Transport subsequently shutdown its operations, thus making the investigation moot. The. Fund then accepted the 1994-1998 collective bargaining agreement to provide the participants immediate eligibility for the higher pension class.

off). This prevents participants from losing previously accumulated credits due to a break in service.

Plaintiff attempted to employ the services of former Central Transport employees on an owner-operator/independent contractor basis. Plaintiff entered into independent contractor agreements with some of these employees, and was actively negotiating with others. According to Defendant, C.C. Mid West wanted the independent contractors to make their own pension contributions by means of the Self-Contribution provisions of the Fund's plan. Defendants claim that, the Fund believed such contributions by employees working for an affiliate of CenTra would violate the Fund's plan and rules regarding self contributions and adverse selection. Therefore, Defendants claim Mr. Kubalanza wrote to former employees of Central Transport advising them of the acceptance of the 1994-1998 collective bargaining agreement and informing them that they would not be able to make Self-Contributions during any periods of time in which they worked for any affiliates of CenTra.

According to Plaintiff, Kubalanza's repeated communications to the, former Central Transport employees constituted threats that were calculated to force many, if not all, of the employees who had entered into owner-operator independent contracts with Plaintiff to sever those ties, since Plaintiff has no contractual connection to the Fund and does not make contributions to it. Plaintiff further claims that Defendants knew or reasonably should have known that the threat would have a chilling effect on negotiations between Plaintiff and former Central Trans-port employees.

Plaintiff filed suit in Oakland County Circuit Court, alleging tortious interference with contract and tortious interference with business expectancies. Defendants removed the case to federal court, claiming that the jurisdiction was proper under ERISA. Plaintiff now moves to remand to case to state court.

III. ANALYSIS

Federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. An action arises under federal law under § 1331 if the federal law creates the cause of action or "the plain-tiff's right to relief necessarily depends on the resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). As a practical matter, virtually no court permits removal on the latter basis, as courts most often require that the complaint itself actually contain a federal claim. *See*, Schwarzer, Tashima, & Wagstaffe, *Federal Civil Procedure Before Trial*, § 2:697 (1997). The fact that a state law cause of action may require reference to a federal law or raise incidental federal issues is not enough to lead to removability. *See, Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); *Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90 (3rd Cir.1992).

A defendant may remove to federal court any civil action arising under the laws of the United States. "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal court. 28 U.S.C. § 1441(a). Whether a particular civil action arises under the laws of the United States depends on application of the "well-pleaded complaint rule." Under that rule, "a cause of action arises under federal law only when the plain-tiffs well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (citing *Gully v. First National Bank* 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

> [T]he plaintiff is the master of the complaint . . . [and] may, by eschewing claims based on federal law, choose

> to have the cause heard in state court . . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one, arising under federal law, thereby selecting the forum in which the claim shall be litigated.

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, "[t]he fact that a defendant might ultimately prove that a plaintiffs claims are preempted does not establish that they are removable to federal court." *Id.* at 398.

Nevertheless, the Supreme Court has recognized some areas of federal legislation that are so comprehensive that they constructively convert state law claims that come within their scope into claims "arising under" federal law, creating a "complete preemption exception" to the well-pleaded complaint rule. *See Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). In *Metropolitan Life*, *supra*, the Supreme Court extended this exception to state law claims that fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a).[3]

ERISA also contains a general preemption provision. With exceptions not relevant here, it states that ERISA "shall supersede any and all State laws insofar as they may now' or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).[4] This clause "is conspicuous in its breath," *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S.Ct: 403, 407, 112 L.Ed.2d 356 (1990), and has been interpreted broadly,

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[3] 29.U:S.C. 1132 is the codified section of ERISA § 502.

[4] 29 U.S.C. 1144 is the codified section of ERISA § 514.

requiring' preemption of state law "even if the law is not specifically designed to affect [an ERISA-governed plan], or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). However, some state laws may have "too tenuous, remote, or peripheral" an effect on a benefit plan to fall within the statute's preemptive force. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

In a recent case involving removal jurisdiction, the Court of Appeals for the Sixth Circuit distinguished between two types of ERISA preemption—preemption implied by § 1132 (a), and preemption explicitly created by § 1144(a). *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir.1995) (en bane). *See also Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940 (6th Cir.1994); *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930, 933-34 (9th Cir.1994); *Alexander v. Anheuser-Busch Companies, Inc.*, 990 F.2d 536, MO (10th Cir.1993). The first "preempts actions brought in state court that could have been brought under ERISA's civil enforcement section." *Alexander* at 943 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53-56, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)). The second preempts state law claims that "relate to" an ERISA governed benefit plan, but could not have been brought under ERISA's civil enforcement provision. *Warner* held that removal jurisdiction is appropriate only if a state law claim falls within the scope of ERISA's civil enforcement provision, § 1132(a)(1)(B):

> [*Metropolitan Life*] ruled that the exception [to the well-pleaded complaint rule] is narrowly limited in the ERISA context to state common law or statutory claims that fall within the ERISA civil enforcement provision of 29 U.S.C. § 1132(a)(1)(B) because "the legislative history consistently sets out this clear intention to make [§ 1132(a)(1)(B)] suits brought by participants or beneficiaries federal questions for the purpose of federal court jurisdiction . . . . " *Id.* at 66. Therefore, in order to

> come within the exception a court must conclude that the common law or statutory claim under state law should be characterized as a superseding ERISA action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," as provided in 1132(a)(1)(B).
>
> The Court specifically stated "ERISA preemption, without more, does not convert a state claim into an action arising under federal law." *Metropolitan Life*, at 64. Section 1144 falls precisely into this category. It allows ERISA to preempt state laws when they "relate to" matters governed by ERISA but does not create a federal cause of action for matters which only "relate to" ERISA's field of concern. Thus, § 1144 preemption does not create a federal cause of action itself, and cannot convert a state cause of action into a federal cause of action under the well-pleaded complaint rule. As a consequence, no removal jurisdiction exists under § 1144.

Warner at 534 (emphasis added).

Plaintiff interprets *Warner* and *Metropolitan Life* to restrict ERISA removal to civil enforcement suits that fall under 1132(a)(1)(B). (Citing *Sears v. Chrysler Corporation*, 884 F.Supp. 1125, 1129 (E.D.Mich. 1995) (citing *Warner*, 46 F.3d at 534); *Greater Lansing Ambulatory Surgery Center v. Blue Cross & Blue Shield of Michigan*, 952 F.Supp. 516, 518 (E.D.Mich.1997); *Moll v. UAW*, 911 F.Supp. 269, 272 (E.D.Mich.1996)). Several other cases also seem to support the proposition that only participants and beneficiaries can bring civil actions under ERISA. *See, e.g., Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940, 946 (6th Cir.1994) ("As previously noted, § 1132 preempts state claims by 'participants or beneficiaries' to enforce certain rights guaranteed by ERISA"); *Fugarino v. Hartford Life & Accident Insurance Co.*, 969 F.2d 178 (6th Cir. 1992) (sole

proprietor could not qualify as "participant" and his child did not qualify as a "beneficiary," and, therefore, they could sue under state law); *Sexton v. John Alden Life Insurance Co.*, 1994 WL 913331, * 5 (M.D.Ala.) ("Put another way, in order for plaintiffs state law claims to be completely preempted . . . he must be entitled to bring an ERISA claim; that is he must have been a 'participant' or 'beneficiary.' "(Citing *Dodd v. John Hancock Mutual Life Ins.*, 688 F.Supp. 564, 568 (E.D.Cal.1988))); *Madden v. Country Life Insurance Co.*, 835 F.Supp 1081, 1087 (N.D.Ill.1993) (same quote as *Sexton*;) *Kelly v. Blue Cross & Blue Shield of Rhode Island*, 814 F.Supp. 220, 231 (D.R.I. 1993) ("This Court, agreeing with the majority of courts opining on this issue, refuses to strip persons who fail to qualify as participants or beneficiaries of the right to sue for recovery arising out of a clearly established contractual relationship.").

Defendants argue that although these cases, especially *Warner* and *Metropolitan Life*, fortuitously fell under that particular provision, which is the most commonly litigated because it involves the recovery of benefits by a participant or beneficiary, removal is available for cases falling under any of the civil enforcement provisions listed in 1132(a). Defendants further argue that Plaintiff's claims are removable because they fall under subsections (2), (3), (4), (5), and (8) of § 1132(a), and under federal common law.

A. *Removability Under § 1132(a)*

The express language of ERISA confirms Defendants' contention that removal is allowed for all actions falling under 1132(a). Section 1132(f), the section which defines the scope of federal court jurisdiction, provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant relief provided for in subsection (a) of this section in any action.

This section clearly confers jurisdiction on federal courts to grant relief provided for claims under in subsection (a), not just subsection (a)(1)(B). The first recourse of statutory interpretation is the language of the statute itself, and if that language is clear and unequivocal, as it is here, no further inquiry is necessary. While the drafters of subsection (f) could have specified that jurisdiction was limited to cases arising under (a)(1)(B), they did not. Thus, the Court interprets the statute as written: to confer federal jurisdiction over cases arising under (a) generally.

The tendency of many courts to use language restricting ERISA enforcement actions to claims arising under § 1132(a)(1)(B), and to use language restricting the proper class of plaintiffs to participants and beneficiaries, is no doubt attributable to the fact that most cases arise under that section. The plaintiffs in these cases typically seek to recover benefits, enforce their rights under a plan, or clarify their future rights under a plan. In fact, nearly all of the cases cited above, including *Warner* and *Metropolitan Life*, assert claims which either fall under 1132(a)(1)(B), or resemble claims under that section. This coincidence has, understandably, caused some confusion over whether ERISA removal is allowed for claims under (a)(1)(B) or (a) generally.

However, a careful analysis of *Metropolitan Life* shows that the Supreme Court often referred to § 1132(a) generally when dealing with ERISA removal. While analogizing 1132(f) to § 301 of the Labor Management and Relations Act (the only. other statute with complete preemption), the Court stated:

> The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> > [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but

> also in State courts of competent jurisdiction. *All such actions* in Federal or State courts *are to be* regarded *as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan Life, 481 U.S. at 65-66 (emphasis added). The Court went on to conclude by stating:

> *Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.* Since we have found Taylor's cause of action to be within the scope of § 502(a), we must honor the intent [of Congress] whether preemption was obvious or not at the time this suit was filed.

Metropolitan Life, 481 U.S. at 66. As the underlined portions of these statements indicates, the Court considered the removability of ERISA actions in the context of 1132(a) generally, without limiting removability to claims brought only under (a)(1)(B).

Finally, a careful analysis of *Warner* reveals that the broad language in that case is limited to (a)(1)(B) because the facts dictated as such. Mr. Warner claimed that he was wrongfully terminated because of his age, and Ford Motor Company responded that he had settled his claim as part of an agreement governing retirement benefits. Because the suit involved retirement benefits, the only part of § 1132(a) which was implicated was the section regarding claims for benefits under a plan, i.e., 1132(a)(1)(B). The same is true for *Metropolitan Life*, in which the only claim at issue arose under § 1132(a)(1)(B). Therefore, federal courts possess jurisdiction over all claims originating under 1132(a), and not just 1132(a)(1)(B).

B. *Plaintiff's Claims are not Removable*

Having ruled that all claims under the civil enforcement provisions of § 1132(a) are removable, the Court now turns to

the crux of the issue presented in this case: whether Plaintiffs claims fall under any of the provisions of § 1132(a). Defendants argue that because Plaintiffs claims stem from communications between the Fund and its participants, it is within the domain of ERISA. Defendants' arguments fail to recognize, however, that the issue of removal in this case revolves not around the relationship between Defendants and their plan participants, but rather the relationship between Plaintiff and Defendants.

Specifically, Defendants argue Plaintiffs claims fall under §§ (2), (3), (4), (5), (8), and under federal common law. The relevant portions of 1132(a) state:

> A civil action may be brought—
>
> (1) *by a participant or beneficiary*—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) *by the Secretary*, or by a participant, beneficiary or fuduciary for appropriate relief under section 1109 of this title;
>
> (3) *by a participant, beneficiary, or fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) *by the Secretary, or by a participant, or beneficiary* for appropriate relief in the case of a violation of 1025(c) of this title; (5) except as otherwise provided in subsection (b) of this section, by the Secretary

> (A) to enjoin any act or practice which violates any provision of this subchapter or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;
>
> * * *
>
> (8) *by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title*, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; . . . .

(Emphasis added). Taken collectively, the only persons empowered to bring civil enforcement actions under the first five subsections of 1132 are the Secretary, participants, beneficiaries, and fiduciaries.[5] Section 1002 of the Act defines these parties as follows:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or who beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.
>
> * * *

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[5] The reference to 1021(f)(1) is not relevant, as that section regards information necessary to comply with Medicare and Medicaid coverage data bank requirements and includes references to employers, plan administrators, insurers, third party administrators, and the like.

(13) The term "Secretary" means the Secretary of Labor.

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority. or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment, advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such terms includes any person designated under section 1105(c)(1)(B) of this title.

Plaintiff C.C. Mid West plainly does not fit within any of these categories. C.C. Mid West is not eligible to receive any benefits ("participant"), or designated by a participant to become entitled to benefits ("beneficiary"). Plaintiff is certainly not the Secretary of Labor, nor is Plaintiff someone who has discretionary authority over the plan ("fiduciary"). In fact, Plaintiff's only link to the Fund is that its new independent contractors participate in the Fund, or were' promised they could participate in the Fund. Therefore, a fair reading of the plain language of the statute indicates Plaintiffs claims do not arise under section 1132 because Plaintiff is not a party authorized to file a civil enforcement action.[6]

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[6] Furthermore, Defendants arguments based on federal common law are without merit. Defendants cite *Armistead v. Vernitron*, 944 F.2d 1287 (6th Cir.1991), which "created federal common law remedies where fiduciaries fail to communicate sufficiently or accurately to participants about eligibility requirements likely to be material to their individual circumstances." (Defendants Brief, p. 14). However, the instant case does not involve a suit between participants and fiduciaries, but rather involves a

This interpretation of which parties are empowered to bring civil suits under 1132(a) is reinforced by the Supreme Court's decision in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct.2841, 77 L.Ed.2d 420 (1983). In that case, the California Franchise Tax Board levied against money held in trust for three union members by a welfare benefit trust seeking to collect unpaid personal income tax. The Board brought a state court action for declaratory relief and the defendant removed the case to federal court. The district court denied the plaintiffs, motion to remand and ruled on the merits of the case.

In reversing the district court and remanding the case, the Supreme Court stated:

> Under 502(a)(3)(B) of ERISA, a participant, beneficiary, or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan's trustees comply with a state levy on funds held in trust. Nevertheless, CLVT's argument that appellant's second cause of action arises under ERISA fails for the second reason given above. ERISA carefully enumerates the parties: entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Franchise Tax Board, 463 U.S. at 26-27. Therefore, "although a suit by the Trustees would 'arise under' federal law, [a] suit against them did not." Schwarzer, Tashima, & Wagstaffe, *Federal Civil Procedure Before Trial*, § 2:96.2 (1997). In the instant case, obviously analogous to Franchise Tax Board, the same is true—while a suit by the Trust would most

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suit between a non-participating employer and the trustees of a Fund, with which Plaintiff has no affiliation.

likely fall within one of the provisions in 1132(a), a suit against the Trust by a party not mentioned in 1132(a) should not invoke federal jurisdiction.

Consequently; both common sense and case law indicates that if Plaintiff is not a party authorized to file a civil enforcement action, its claim does not "arise under" § 1132: In *Madden v. Country Life Ins. Co.*, 835 F.Supp. 1081 (N.D.Ill. 1993), the plaintiff, a law partner, claimed that the defendant insurance company wrongfully rescinded coverage under a group health insurance policy.

The court stated that "if the court could ignore the identity of the party seeking to avail himself of the remedies sought, the remedies themselves would appear to come within the type for which Congress expressed the intent to provide the exclusive remedy under ERISA and thus to preempt." Madden, 835 F.Supp. at 1084. However, the court continued:

> The identity of the party seeking to avail himself of the remedies cannot, however, be ignored. Only if a party fits within the definitions of the parties enumerated for particular remedies under ERISA is the party entitled to invoke these remedies. *Giardono v. Jones*, 867 F.2d 409, 411-14 (7th Cir.1989). "ERISA carefully enumerates the parties entitled to relief under § 502 [29 U.S.C. § 1132]." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27, 103 S.Ct. 2841, 2855, 77 L.Ed2d 420 (1983): "The phrasing of § 502 is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief." *Id.* at 25, 103 S.Ct. at 2854.

Id. at 1085. Ultimately, the court concluded that because the law partner was not a participant or beneficiary under § 1132 (a)(1)(B), the section under which such a claim would fall, his state law claims were not preempted. "To hold otherwise would be 'to strip persons who fail to qualify as participants

or beneficiaries of the right to sue for recovery arising out of a clearly established contractual relationship. *Kelly*, 814 F.Supp. at 230-31 (listing supporting cases)." *See also*, *Romani v. Prudential Ins.*, 1994 WL 514030, *2 (N.D.Cal.) (in order for plaintiffs state law claims to be completely preempted, he must be entitled to bring an ERISA claim) (citing *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir.1991)).

Defendant never deals directly with this shortcoming, but makes an array of arguments supporting removal based on cases which are distinguishable from the instant case. First, Defendant cites *Martin v. General Motors Corporation*, 753 F.Supp. 1347 (E.D.Mich.1991), in which this Court found that removal was proper despite the fact that the plaintiff was not a participant and then dismissed the case for lack of standing to bring an action under ERISA Defendant fails to mention, however, that the plaintiff in Martin claimed to be a "participant." The Court denied his claim, concluding that "ERISA preempts state law causes of actions alike with respect to both persons who are actually 'participants' or 'beneficiaries' of employee benefit plans and persons who claim to be 'participants' or 'beneficiaries' of employee benefit plans." Martin, 753 F.Supp. at 1358. The instant case is distinguishable from Martin because Plaintiff C.C. Mid West does not claim to be a participant, or any other party entitled to bring suit.

Next, Defendant cites *Harper v. TRW*, 881 F.Supp. 294 (E.D.Mich.1995), for the proposition that the proper focus is whether the plaintiffs claims fall within an area of law where Congress has indicated an intent to completely preempt state court adjudication. (*Id.* at 296 ("If Congress intends that a federal statute 'completely preempt' an area of state law, any complaint alleging claims under that area of state law is presumed to allege a claim arising under federal law.")). Defendant claims Harper is in accord with *Romney v. Lin*, 105

F.3d 806, 812 (2nd Cir. 1997), cert. denied, __U.S.__, 118 S.Ct 263, 139 L.Ed.2d 189 (holding that a plan trustee's suit against people that ERISA's civil enforcement provisions did not identify as proper defendants was properly removed), in which the court stated:

> The "scope" question was an easy one in Metropolitan Life since the suit "by a beneficiary to recover benefits from a covered plan . . . f[ell] directly under § 502(a)(1)(B) of ERISA" *Id.* at 62-63, 107 S.Ct at 1546. Metropolitan Life thus shed little light on how far this Court might go in deeming a suit to be "within the scope" of § 502(a). That decision makes clear, how ever, that even though a suit is preempted by ERISA, it is not necessarily within federal court jurisdiction. There are thus some cases in which a state law cause of action is preempted, but only a state court has jurisdiction to so rule.
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> Plainly, this Court cannot have meant that the only suits "within the scope" are those so completely within the four corners of ERISA as to be winning ERISA, claims, since the "scope" inquiry arises only as to claims that are defeated by ERISA's pre-emption provision.

Romney, 105 F.3d at 813.

While Defendants argue that Romney court's focus was on whether the issue is of central concern to ERISA, they offer only part of the picture. The court further stated:

> We think a suit that alleges an ERISA violation can be within the scope of ERISA, even though it is directed against a defendant not liable under ERISA, and that Romney's suit is within the scope of § 502. Unlike the claim in Franchise Tax Board, where "the State's right to enforce its tax levies is not of central concern to the

> federal statute," 463 U.S. at 25-26,.103 S.Ct. at 2855, Romney's suit to collect ERISA contributions is very much of central concern to the federal statute. Moreover, whereas the Supreme Court noted that "ERISA does not provide an alternative cause of action in favor of the State to enforce its [tax] rights," *id.* at 26, 103 S.Ct. at 2855, ERISA explicitly provides such a cause of action for Romney, at least vis a vis the employer.

Romney, 105 F.3d at 813. The court's explanation reveals two important distinguishing factors. First, the issue in *Romney* was whether a suit was within the scope of ERISA despite the fact that the defendant was not liable under the statute, not whether complete preemption applied to a plaintiff not entitled to bring suit under the civil enforcement provisions of ERISA Second, in *Romney*, ERISA explicitly provided the plaintiff with a cause of action, unlike the instant cause in which the statute does not even authorize C.C. Mid West to be a plain-tiff for ERISA civil enforcement actions.

Defendants next rely upon *General American v. Castonguay*, 984 F2d 1518 (9th Cir. 1993). In Castonguay, an ERISA trust that provided health benefits to particular can dealers and their employees bought an insurance policy from the plaintiff, under which the plaintiff was to pay a portion of the claims made by the trust members, and any residual amount the trust could not pay. The insurance company covered the trust's deficiency, and sought to hold the trustees personally liable for the money. However, the court ruled that the state law claims were preempted by ERISA because ERISA al-ready regulated the trust-trustee relationship by imposing a fiduciary duty to the plan's beneficiaries, demanding they avoid certain conflicts of interest, and making them personally liable for a breach of fiduciary duty.

This case, although relied upon by Defendants, in reality better illustrates why the instant case should be remanded to

state court. The court emphasized the importance of the relationships regulated by ERISA:

> The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships: for instance, the relationship between plan and. plan member, between plan and employer, and between employer and employee (to the extent an employee benefit plan is involved), and between plan: and trustee.
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> * * *
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> To determine whether a state law is preempted we must look at whether it encroaches on the relationships regulated. by ERISA

Castonguay, 984 F2d at 1521-1522.

Here, the relationship between Plaintiff C.C. Mid West and the Fund is not one that is regulated by ERISA. Plaintiff is an on-participating employer, who does not have any relationship whatsoever with the Fund, let alone one that is governed by the terms of ERISA As such, the relationship implicated in the instant case—between two competitors—does not fall within the purview of 1132(a).

Finally, Defendants cite *Tolton v. American Biodyne*, 48 F.3d 937 (6th Cir.1995), in which the plaintiffs sued under state law for wrongful death, medical malpractice, and other such claims, regarding the suicide of their family member. Plaintiffs later specifically amended their complaint to include a claim under ERISA The court ruled that ERISA: preempted the plaintiffs' claims, despite not providing an adequate remedy for the wrongs they alleged. *Tolton* is easily distinguishable from the instant case, however, because in *Tolton* the plaintiff alleged ERISA claims on the face of the

amended complaint, whereas Plaintiff C.C. Mid West alleged solely state claims in its complaint.

In addition to these cases, at the hearing on this matter defense counsel urged the Court to examine *Feldman v. Green*, 138 Mich.App. 360, 360 N.W.2d 881 (1984). In *Feldman*, the Michigan Court of Appeals set out the elements for a claim of tortious interference with a contractual or business relationship:

> We hold, consistently with prior rulings by the Supreme Court of this state, that one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs contractual rights or business relationship.

Feldman, 138 Mich.App. at 369, 360 N.W.2d 881. Defendant claims that because the communication to its participants was "justified," and in fact necessary, that Plaintiff's claim requires an interpretation of federal law because the employer-participant relationship is governed by ERISA In short, Defendants argue the case should be removable to federal court because an analysis of the sufficiency of the complaint would require a court to determine whether Defendants communications were required by or consistent with ERISA and thus "justified."

However, this argument is insufficient to invoke federal jurisdiction because it is a defense, and as a defense it does not appear on the face of the well-pleaded complaint, and thus does not authorize removal to federal court. *Metropolitan Life*, 481 U.S. at 63-64 (citing *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)). . . . Federal question jurisdiction does not exist where the complaint is based entirely on state law, even if issues of federal law will undoubtedly be raised in the defendant's

answer. *Phillips Petroleum Co. v. Texaco, Inc*, 415 U.S. 125, 128, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974). Defendants' argument is no more than an attempt to inject their defense into Plaintiffs complaint. Accordingly, Defendants' justification argument, while perhaps a valid defense, does not appear on the face of the well-pleaded complaint and, therefore, does not provide a basis for removal jurisdiction.

IV. CONCLUSION

In the final analysis, Plaintiffs claims are not removable under ERISA The complaint asserts solely state law claims, and Plaintiff would be unable to bring a civil enforcement action under § 1132(a) because Plaintiff is not a party authorized to do so under that section. ERISA simply does not regulate the relationship between C.C. Mid West and the Fund, if a relationship even exists. The Court cannot allow Defendant to inject a federal question into Plaintiffs case to trans-form the action into one arising under federal law. To allow Defendant to do so would make Plaintiff "master of nothing." *Warner*, 46 F.3d at 534.